



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Great Southwestern Construction, Inc.

**File:** B-252917

**Date:** April 14, 1993

Janet K. Williams, Esq., Mulliken, Gleason & Weiner, P.C., for the protester.  
Catherine M. Evans, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest of agency's rejection of bid as nonresponsive due to protester's failure to include required bid bond with the bid is dismissed as untimely where initial objection filed with the contracting officer did not meet the requirements of an agency-level protest.

### DECISION

Great Southwestern Construction, Inc. protests the rejection of its bid under invitation for bids (IFB) No. DE-FB65-93W111975, issued by the Western Area Power Administration, U.S. Department of Energy, for construction of a power transmission line. The agency rejected Great Southwestern's bid because it did not include the required bid guarantee; Great Southwestern did not submit its bid bond until after bid opening.

We dismiss the protest.

Section L.16 of the IFB provided for submission of a bid guarantee in the amount of 20 percent of the bid, and informed offerors that "failure to furnish a bid guarantee in the proper form and amount may be cause for rejection of the bid." Section I.53 of the IFB contained the clause at Federal Acquisition Regulation (FAR) § 52.228-1, Bid Guarantee, which requires the submission of a bid guarantee in the proper form and amount by the time set for bid opening, and provides for rejection of bids not meeting this requirement.

Bid opening took place on February 18, 1993, at 11 a.m. Great Southwestern submitted the low bid by that time but did not deliver its bid guarantee (in the form of a bid bond) until later that day, after the bid opening time. Apparently anticipating that its bid would be rejected

because the bid bond was late, Great Southwestern wrote to the contracting officer on February 25 to explain why it was unable to submit the bond with the bid. Great Southwestern stated that its bonding company had refused to authorize release of the bond because the Small Business Administration (SBA) refused to release a security interest it held in Great Southwestern's accounts receivable.

On March 11, Great Southwestern received a written notice that its bid had been rejected. That same day, Great Southwestern's bonding agent wrote to the contracting officer asking her to reconsider her decision. On March 15, Great Western sent a letter to the contracting officer stating the following:

"Please consider this letter our formal request to log a protest in the award of the above referenced IFB. We refer by reference to our previous letter dated February 25, 1993 and the letter of March 11, 1993 from our bonding agent.

"We feel that the facts presented in these letters should be presented to the Comptroller General for their decision regarding this bid."

On March 23, the contracting officer advised Great Southwestern by telephone conference that she did not agree with the firm's position. Great Southwestern then filed this protest with our Office on April 2, essentially arguing that the agency should accept the bond and the bid because the bond's lateness was due to improper action on the part of the SBA.

Great Southwestern's protest is untimely. Under our Bid Protest Regulations, protests concerning matters other than apparent solicitation improprieties must be filed with our Office or the contracting agency within 10 working days after the protester knew or should have known the basis for the protest. 4 C.F.R. § 21.2(a)(2), (a)(3) (1993). In general, a properly filed agency-level protest tolls the time for filing with our Office until the agency responds to the protest or takes some action adverse to the protester's interests; any subsequent protest to our Office must be filed within 10 days after the protester received notice of adverse action on the agency-level protest. 4 C.F.R. § 21.2(a)(3).

Great Southwestern asserts that its protest is timely because it was filed within 10 days of the adverse action on its March 15 agency-level protest. However, we find that Great Southwestern's March 15 letter to the agency did not constitute an agency-level protest, and that its subsequent

protest to our Office therefore was untimely. In this regard, FAR § 33.103(b)(3) requires that an agency-level protest contain, among other things, a request for a ruling by the agency. Great Southwestern's March 15 letter to the contracting officer did not state that it was to be an agency-level protest and did not request any response or relief from the agency; instead, it asked for a ruling by our Office. On its face, therefore, the letter did not contain sufficient information to constitute an agency-level protest. See Shankle's Eng'g & Consulting, 68 Comp. Gen. 43 (1988), 88-2 CPD ¶ 565 (letter to agency confirming general intent to protest is not sufficient to constitute agency-level protest). Furthermore, while the March 15 letter requested a ruling by our Office, that letter was never filed in our Office; Great Southwestern did not actually file a protest with our Office until April 2. In the final analysis, therefore, Great Southwestern did not protest the rejection of its bid to the agency, and since it did not file a protest in our Office until April 2, more than 10 working days after it learned of the rejection of its bid on March 11, the protest is untimely.

In any case, the protest fails to state a legally sufficient basis. The submission of a required bid bond is a material condition of responsiveness with which a bid must comply at the time of bid opening. Blakelee, Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65. Great Southwestern admittedly failed to submit its bid bond with its bid. Great Southwestern argues that its failure should be excused because the instruction letter furnished with the IFB did not specify that a bid guarantee was required with the bid; Great Southwestern notes that instructions to bidders generally take precedence over any inconsistent solicitation clauses. See FAR § 52.214-29, Order of Precedence--Sealed Bidding. However, as noted above, the IFB did contain instructions, at section L.16, requiring a bid guarantee. Moreover, the separate instruction letter, which did not mention a bid guarantee at all, was not inconsistent with either the section L.16 instructions or the section I.53 clause that required a guarantee; the Order of Precedence provision therefore would not be applicable here. Great Southwestern also argues that its late submission should be excused because the lateness was the fault of the government, that is, the SBA's refusal to release its security interest. However, the only circumstance where government action operates to excuse late submission of bid materials is where a bid was sent by mail, and mishandling by the contracting agency during or after receipt of the bid at the government

installation was the paramount cause of the lateness. See  
FAR § 14.304-1(a)(2); Microreflect, 66 Comp. Gen. 269 (1987),  
87-1 CPD ¶ 173. As that was not the case here, the agency  
was required to reject the bid.

The protest is dismissed.

A handwritten signature in black ink, appearing to read "John M. Melody". The signature is fluid and cursive, with the first name "John" being the most prominent.

John M. Melody  
Assistant General Counsel